NO. 91-188

IN THE SUPREME COURT OF THE UNITED STATES

JULY TERM, 1991

In re COOPER/T. SMITH, et al.

Elizabeth Ross ABSHIRE, etc.,
Plaintiff-Appellant,

v.

GNOTS-RESERVE, INC., et al.,
Defendants-Appellees.

Sandra Marie CORMIER, etc., Plaintiff,

v.

AMERICAN COMMERCIAL LINES, et al.,
Defendants.

Petition on Behalf of Elizabeth Abshire,
Claimant in Limitation,
For Writ of Certiorari To the United States
Court of Appeals For The Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit has challenged the clear mandate set by the Jones Act and general maritime law when it abolished a seaman's right to use a "featherweight" standard of proof which includes a very low evidentiary threshold for submission of facts to a jury, by its refusal to use the prevailing summary judgment standard used by a majority of the circuits and this Court in Jones Act cases involving mysterious seamen drownings.

PARTIES TO THE PROCEEDINGS

Donald Abshire, decedent
Elizabeth Abshire
Sandra Cormier, natural tutrix of Dana Abshire,
previous plaintiff
Cooper/T. Smith Stevedoring, Inc. d/b/a Terrence Derrick
& Lighterage Co.
Gnots Reserve, Inc.
American Commercial Barge Lines

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1. July 20, 1990 Order of the United States District Court, Eastern District of Louisiana, Civil Action Number 88-4058 c/w 88-4737 and 89-0583, In The Matter of Cooper T. Smith Stevedoring Company, Inc., d/b/a Terrence Derrick & Lighterage Co., Inc., As Owner and Operator of the D/B KEVIN, Praying for Exoneration From and/or Limitation of Liability granting motions for summary judgment filed on behalf of Cooper/T. Smith and Gnots-Reserve, Inc.

2. In Re Cooper/T. Smith, 929 F.2d 1073 (5th Cir. 1991), affirming the lower court's decision which dismissed the claims of Elizabeth Abshire, claimant in limitation, April 30, 1991.

JURISDICTION

Jurisdiction in this Court is founded upon this Court's final review of admiralty and maritime causes, United States Constitution, article III, section 2, clause 2, upon 28 U.S.C. sections 1257 and 2104 and its discretionary authority pursuant to considerations governing review on Writ of Certiorari.

STATUTES INVOLVED

1. U.S. Constitution, article III, section 2, clause 1 (Admiralty and Maritime Jurisdiction)

[1.] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all cases affecting Ambassadors, other public Ministers and consuls; to all Cases of admiralty and maritime Jurisdiction; to controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

2. 28 U.S.C. section 1333

1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

3. 45 U.S.C. section 51

51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages

to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

4. 46 U.S.C. section 183

183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of

such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as is no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or

knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d) and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, non-descript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.

5. 46 U.S.C. section 688

688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in case of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

This action was originally instituted by Cooper/T. Smith Stevedoring Company, Inc. (hereinafter "Cooper") through a Limitation of Liability action pursuant to 46 U.S.C. section 183. Elizabeth Abshire (hereinafter "Mrs. Abshire"), subsequently filed a claim pursuant to the Jones Act, 46 U.S.C. 688 against Cooper under the limitation action as well as third party claims against two separate defendants, Gnots-Reserve, Inc. (hereinafter "Gnots"), and American Commercial Barge Lines (hereinafter "ACBL"), alleging that her husband's death was caused by the combined negligence of said parties. General maritime negligence claims were brought against Gnots and ACBL, which were consolidated into the limitation proceeding.

Cooper, Gnots and ACBL all filed motions for summary judgment. Abshire did not oppose the motion filed by ACBL and voluntarily dismissed said party. The District Court granted summary judgment in favor of Cooper and Gnots. Abshire appealed. The Fifth Circuit Court of Appeals affirmed the lower court's decision.

On February 19, 1988, Donald Abshire (hereinafter "Abshire"), was working in the course and scope of his employment as a seaman, and a member of the crew of the barge, D/B KEVIN. The D/B KEVIN was owned by Cooper. Abshire was employed as a crane operator aboard the D/B KEVIN. His duties included operating the crane and securing the barges and taking up and making lines.

Abshire was last seen on February 19, 1988 when he told a crew member he was going to take up the line on barge ACBL-2892. While Abshire was in furtherance of his duties in the service of D/B KEVIN, suddenly and without warning, he

slipped or was thrown from the deck of the barge into the river. He perished due to drowning and was found several months later.

On the day of Abshire's disappearance the push boat GNOTS I was assigned to shift various barges to and from the Gnots Destrehan fleet. The barges were then transported downriver to a mid-stream anchorage where two Cooper barges, the D/B KEVIN and the D/B Frank L were unloading a cargo of steel coils from the cargo vessel S/S PARASKEVI.

Abshire was involved in the operation of removing certain articles from the S/S PARASKEVI and placing them into open barges which were moored along side the D/B KEVIN. As each barge was filled with different materials, it would be removed from the flotilla by a push boat. The push boat was owned by Gnots, and piloted by Captain Andrew Sherman. The positions of the barges were as follows: ACBL-2892 was first off; the ACBL-1403 was second off; and the ACBL-1323 was third off.

At about 4:00 p.m. the first off barge, the ACBL-2892, had been loaded and was ready to be moved by the Gnots I. At the same time, Clifford Bauer was operating the crane on the D/B KEVIN, and Abshire and another crew member, Robert Smith, were going to handle the lines to assist in the moving of the ACBL-2892 barge. Darrel Gonsoulin, the crane operator of the Frank L, was going to man the winch since Abshire was going to catch a line in preparation for movement of the barge.

At the same time, Captain Sherman was attempting to maneuver the Gnots I to remove the ACBL-2892. Because of the accumulation of debris at the stern end of the barge ACBL-2892, Captain Sherman attempted certain maneuvers to remove the debris. First, using the nose of Gnots I, he attempted to sweep the debris by sliding the nose of the Gnots I across the stern of the

ACBL-2892. Captain Sherman stated that the attempt was unsuccessful because of the strong currents coming down river. Captain Sherman eventually removed the debris by using "prop wash" of the Gnots I to disturb the accumulated debris.

Coast Guard investigator, William G. Wetherington, reported that Captain Sherman was prevented from getting the Gnots I within about five feet of the ACBL-2892 barge, but that this was remedied with "prop-wash". Captain Sherman testified quite differently explaining that "prop wash" was used only after the ACBL-2892 was completely away from the rig.

When the ACBL-2892 was removed, the only person aboard the ACBL-2892 was Abshire. Bauer was in the crane, Smith was back aboard the D/B KEVIN, and Gonsoulin was manning the winch on the D/B KEVIN. Gonsoulin had stated he was unable to hear anything because of the winch's motor sound. The "prop washing" by the Gnots, the movement of Abshire, and the stated activity of the crew members were all occurring at approximately the same time.

The testimony of Robert Smith, one of the last persons to see Abshire, indicates that Abshire took his work vest off when he got into the crane at approximately 1:00 o'clock. Approximately three hours later, Abshire was missing. No one recalled whether Abshire was wearing a life preserver or work vest immediately before his disappearance. In Wetherington's final report he stated that the cause could not be determined but it was probable that Abshire fell from the ACBL-2892 into the river while handling the lines.

FEDERAL QUESTION RAISED TIMELY

The federal question whether the proper standard of review was used in Jones Act and general maritime claims was raised in petitioner's appeal to the Louisiana Fifth Circuit Court of Appeals dated December 10, 1990.

ARGUMENT

This Court has recently been called upon to resolve conflicts in the appellate circuits regarding foundational issues of the Jones Act and general maritime law. In cases such as McDermott International, Inc. v. Wilander, 887 F.2d 88 , affirmed, ___ U.S. ___, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991), Bach v. Trident Steamship Co., 920 F.2d 322, reversed ___ U.S. ___, 111 S.Ct. 2253, 920 F.2d 322 (1991), Gizoni v. Southwest Marine, Inc., 909 F.2d 385, 1991 A.M.C. 711 (9th Cir. 1990), writ granted on limited issue, ___ U.S. _____, 111 S.Ct. 1071, 112 L.Ed.2d 1176 (February 25, 1991), and Campo v. Electro-Coal Transfer Corp. Inc., 909 F.2d 1480 (5th Cir. 1990), pet. for cert. filed and pending (December 5, 1990) this Court is facilitating consistent rules throughout all eleven circuits. This Court is again called upon to resolve a conflict between the Fifth Circuit and a majority of the appellate circuits on an issue developed on the facts below.

THE SLIGHT STANDARD

In the present case, the Fifth Circuit has completely ignored the prevailing mandate of most circuits and this Court by taking away from jury consideration the question of defendants' acts of negligence in a Jones Act and general maritime law case. When there is an evidentiary basis for the making of a finding on the issue of negligence, it should be submitted to the jury. Butler v. Whiteman, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958), Schultz v. Pennsylvania R. Co., 350 U.S. 523, 76 S.Ct. 608, 100 L. Ed. 668 (1956). And although the issue of negligence may be close, it does not justify a court to usurp the function of the jury. Milos v. Sea-Land Service, Inc., 478 F. Supp. 1019 (S.D. N.Y. 1978), affd without op (2d Cir. 1978) 622 F.2d 574, cert. den. 449 U.S. 954, 101 S.Ct. 360, 66 L.Ed.2d 219 (1979), Borras v. Sea-Land Service Inc., 586 F.2d 881, 1979 AMC 2222 (1st Cir. 1978).

The Jones Act relies upon the general principles of maritime law, including a special solicitude for the welfare of those men who venture upon hazardous and unpredictable sea voyages. Moragne v. States Marine Lines, 398 U.S. 375, 90 S.Ct. 1772, 1780, 26 L.Ed.2d. 339 (1970). In Socony-Vacuum Co. v. Smith, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939), this Court explained that Congress intended the Jones Act to expand, not limit, admiralty's protection of its wards. (cited in Daughenbaugh v. Bethlehem Steel Corp., 891 F.2d 1199 (6th Cir. 1989).

Ordinarily, a claim for a maritime tort is determined exclusively in admiralty by a judge. When a maritime claim is coupled with a Jones Act claim, however, the jury may resolve all issues including maritime issues. McPhillamy v. Brown and Root, Inc., 810 F.2d 529, fn. 2 (5th Cir. 1987). Therefore, in the present case, all issues of negligence, causation and damages should be tried before a jury.

As the noted admiralty text authors, Gilmore and Black observe regarding negligence under the Jones Act, "it would be a rare court in an unusual case which would take the negligence issue away from the jury..." G. Gilmore & C. Black, The Law of Admiralty 311 (1957). However, that is precisely what the lower court decisions have accomplished in the instant case.

Understanding that the standard of proof in a Jones Act claim is different from that of an ordinary civil action, courts have characterized a plaintiff's burden under a Jones Act claim as "featherweight". Under this standard even marginal claims have been properly left for jury determination. Holmes v. J. Ray McDermott and Co., 734 F.2d 1110 (5th Cir. 1984).

In the case of Landry v. Two R. Drilling Co., 511 F.2d 138 (5th Cir. 1975), Judge Gee, in a concurring opinion, recog-

nized the standard in Federal Employers Liability Act (FELA)/ Jones Act cases. He noted that in FELA cases "speculation, conjecture and possibilities suffice to support a jury verdict." citing Gibson v. Elgin J & E Railway, 246 F.2d 834, 837 (7th Cir.), cert. denied, 355 U.S. 897, 78 S.Ct. 270, 2 L.Ed.2d 193 (1957).

In Landry, supra at 142, the majority, citing two Supreme Court decisions, stated "The jury in [Jones Act and general maritime law] cases is entitled to make 'permissible inferences from unexplained events,' whether the case is brought under the Jones Act or under general maritime law." citing Johnson v. United States, 333 U.S. 46, 68 S.Ct. 391, 92 L.Ed. 468 (1948), and Alaska Steamship Co., Inc. v. Petterson, 347 U.S. 369, 74 S.Ct. 601, 98 L.Ed. 798, per curiam, (1954). The Court in Landry further explained:

> The Supreme Court has repeatedly said that it is not the function of the court in Jones Act and analogous cases to 'search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that proof gives equal support to inconsistent and uncertain inferences.' Citing Tennant v. Peoria and P.U.R. Co., 321 U.S. 29, 35, 69 S.Ct. 409, 412, 88 L.Ed. 520 (1944); Schultz v. Penn. R. Co., 350 U.S. 523, 526 n.8, 76 S.Ct. 608, 100 L.Ed. 668 (1956).

In the instant case, the facts, as depicted in a light most favorable to Mrs. Abshire, infer that the Gnots I, without direction from employees of Cooper, bumped or jolted the ACBL-2892 as Abshire was preparing the barge for movement. Certainly, taking the time sequence and testimony of all fact witnesses would allow the jury "to make permissible inferences from unexplained events." Johnson, supra. The jury could infer that

due to Gnots' negligence, either in bumping the barge or failing in its duty to use reasonable care when ridding the accumulation of debris, Abshire lost his life. The jury could also infer that because Cooper's life vest policy was inadequate Abshire lost his life unnecessarily. His life may have been spared if he had either been wearing a life vest or wearing a standard one issued by the company. The Fifth Circuit revoked the jury's opportunity to make the permissible inferences as to any theory of negligence or causation pertaining to Cooper and Gnots when it failed to consider the facts and circumstances in the light most favorable to Mrs. Abshire.

Furthermore, the Fifth Circuit did not follow its own decision in Boeing Company v. Shipman, 411 F.2d 365 (5th Cir. 1969), which utilized a similar standard in a directed verdict and JNOV. The Court stated that courts should consider all evidence "in the light and with all reasonable inferences most favorable to the party opposed to the motion." The court reasoned that it was "the function of the jury as the traditional finder of facts, and not the court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." The facts as presented herein, in the light most favorable to Mrs. Abshire, favor a jury's complete examination and determination of the facts and testimony against Gnots and Cooper.

OTHER CIRCUITS' VIEWS

The Fifth Circuit failed to utilize the summary judgment standard mandated by featherweight proof in Jones Act cases as applied by a majority of the circuits and by this Court. For example, the Ninth Circuit Court of Appeals has stated,

> In wrongful death actions sounding in negligence under the Jones Act or sounding in unseaworthiness under general maritime law, when the exact circumstances of the casualty are unknown, the United

> States Supreme Court has fundamentally transformed traditional negligence law respecting causation by permitting the finder of fact to supply by inference many of the elements normally required to be proven by the plaintiff or claimant. Admiral Towing Company v. Woolen, 290 F.2d 641 (9th Cir. 1961).

The Court reasoned, "an accident may be inferred from the fact of disappearance, and the where and when of the accident need not be fixed exactly. As to how or why the accident occurred, considerable speculation is permitted." Id. at 649.

Further, the Court in that case held that the trier of fact must be afforded substantial latitude in making this determination even though the evidence supporting it is slight and even though the reviewing court might have arrived at a different conclusion. Id.

The reason for having the featherweight burden of proof in the instant case is to allow Mrs. Abshire the opportunity to present to the jury all the factual circumstances and allow it to draw inferences in order to resolve the issues. The jury has no other choice than to draw inferences when the causation link in a case is questionable. One minute Abshire was on the vessel, the next he was not. Only the jury should decide the weight and credibility of the witnesses and then draw inferences from the testimony presented.

Although the Fifth Circuit said it recognized the "featherweight" burden of proof plaintiff has under the Jones Act, it failed to recognize the permissible jury speculation and conjecture by using a strict summary judgment standard. It also failed to recognize the jury's wide discretion regarding the facts under both the Jones Act and general maritime law. See Landry, supra

at 142. In both claims the jury is entitled to make "permissible inferences from unexplained events." The slight standard employed by the Jones Act, and recognized by the majority of circuits, is without meaning if it is not utilized in cases such as this one.

In Schultz v. Pennsylvania Railroad Company, 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668 (1956), a FELA case, which the Jones Act is based upon, a watchman while discharging his duties mysteriously disappeared and his body was discovered weeks later. The allegations of negligence were that the employer, among other things, failed to provide decedent a safe place to work.

This Court reversed the Court of Appeals' decision in that case and remanded the case for submission to the jury. This Court stated,

> Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn. Schultz, 76 S.Ct. at 611.

Also, in Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), this Court held under the Federal Employers' Liability Act and the Jones Act, which was modeled after it, the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

Most notably, the "Courts should exercise special care in considering summary judgment in Jones Act cases which require a very low evidentiary threshold for submission to a jury." Daughenbaugh, supra at 1207. In Lies v. Farrell Lines, Inc., 641 F.2d 765, 770-71 (9th Cir. 1981), the Ninth Circuit has stated that under the Jones Act, a jury question is presented if 'employer negligence played any part at all in the employee's injury'. Furthermore, the Sixth Circuit's reluctance to dispose of Jones Act claims through summary judgment was shared by the Fourth Circuit in Van Horn v. Gulf Atlantic Towing Corp, 388 F.2d 636 (4th Cir. 1968).

In Daughenbaugh, supra, the Sixth Circuit Court of Appeals held that the question of liability for a seaman's mysterious drowning should be left for the jury. The District Court entered summary judgment in favor of the shipowner. However, the Court of Appeals held that questions of fact precluded summary judgment.

The Sixth Circuit stated, "The Court has not approved summary judgments that rest on credibility determinations. Credibility determinations, the weighing of the evidence, and the drawing of the legitimate inferences from the facts are jury functions, not those of a judge." Citing to Anderson v Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) in Daughenbaugh, supra, at 1205.

Furthermore, the Court reasoned that there was eminent authority in support of the proposition that issues of negligence are ordinarily not susceptible of summary adjudication, but should be resolved by trial in the ordinary manner. Citing to Rogers v. Peabody Coal Co., 342 F.2d 749, 751 (6th Cir. 1965). The Court also held that "in light of the policy of providing expansive remedies for seamen, submission of Jones Act claims to a jury requires a very low evidentiary threshold; even marginal

claims are properly left for jury determination." Citing to Leonard v. Exxon Corp., 581 F.2d 522, 524 (5th Cir. 1978), cert. denied, 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed.2d 397 (1979).

In the instant case the facts, as revealed through deposition and investigation illustrate that the question of Cooper's liability should have been left for jury determination. The personal deposition of Steve Pond, Cooper's director of loss control or "safety man", illustrates Cooper's potential culpability due to the company's lax attitude about allowing crew members to use their own life vests instead of company issued models. The confirmed fact that Abshire's body was discovered months later without a life vest raises a question for the jury whether the defendant failed to institute or enforce safety regulations regarding life vests or whether these regulations were adequate.

Moreover, if defendant's policy regarding crew members wearing life vests was inadequate, this inadequacy would clearly have been a legal cause of Abshire's death by drowning, especially since Abshire's body was not seen rising to the surface anywhere in the vicinity of the rig after an exhaustive search of the area.

Also in the instant case, it can be inferred that Gnots' negligence included Captain Sherman's attempt to remove debris from the stern of barge ACBL-2892, or in his attempt to face up to the same barge. Abshire was making lines at approximately the same time that Captain Sherman was attempting to remove the debris. Captain Sherman either attempted the debris removal by a "prop wash" maneuver, or by sweeping the debris with the bow of the Gnots I. Captain Sherman's maneuvers may have contributed to Abshire's fall into the water. All of the crew members, except for Abshire, were aboard the D/B KEVIN immediately prior to the removal of barge ACBL-2892. The jury, not a judge, should determine the credibility of Captain

Sherman's testimony to resolve the question of whether the debris removal attempts caused Abshire to be thrown from barge ACBL-2892. See Daughenbaugh, supra, at 1205.

SIMILAR CASES GO TO THE JURY

In cases similar to the instant one, courts have held that circumstantial evidence does not preclude a finding for plaintiffs. In Hebert v. Otto Candies, Inc., 402 F.Supp. 503 (E.D.La. 1975), the District Court for Eastern District of Louisiana held that an employer's liability could be shown although the exact circumstances of the accident were unknown. A crewboat skipper drowned while in the course of his employment; his wife brought an action under the Jones Act and general maritime law. The Court reasoned that as in all unwitnessed accident cases, the evidence was almost entirely circumstantial in nature, however, that fact did not negate a finding for the plaintiff. Id. at 506.

In Gaymon V. Quinn Menhaden Fisheries of Texas, Inc., 118 So.2d 42 (Fla. App. 1960), cited with approval in Admiral Towing Company v. Woolen, 290 F.2d 641 (9th Cir. 1961), a crewman on a fishing boat mysteriously fell from the boat and drowned. The Court held that the question of whether the employer was guilty of negligence was a question for the jury and, therefore, held the lower court's granting employer's summary judgment was improper.

The Gaymon court stated "it is not necessary to show that employer negligence was the proximate cause of the injury or death complained of but that it is sufficient to establish a jury question by simply showing some negligence on part of the employer coupled by direct or circumstantial evidence to the injury or death of an employee." Gaymon, supra at 46.

Additionally, in Randall v. Bisso, 207 F.Supp. 89 (E.D.La. 1962), the District Court for the Eastern District of Louisiana

held that a seaman's father was entitled to recover under the Jones Act for the death of a seaman who fell, slipped or was precipitated overboard and drowned. As in the instant case, the accident was unwitnessed and the precise circumstances under which it occurred were unknown.

In contrast to these cases, the Fifth Circuit has denied Mrs. Abshire the opportunity to present all of the facts to a jury concerning the liability of Gnots and Cooper. Considering the movement of the Gnots I facing up to and attempting to remove debris without warning or notice to the employees in the area, the jury could likely have returned a verdict based on permitted inferences and conjecture from the facts presented. Also, Cooper's lax attitude which allowed the crew members to use their own life vests instead of company issued models illustrates a jury question regarding Cooper's liability. Due to the fact that inferences had to be drawn to fill in the gaps left by the evidence, both negligence issues should have been presented for a jury determination. However, the Fifth Circuit denied Mrs. Abshire's right to this featherweight standard by using a regular summary judgment standard, which is in conflict with most circuit court decisions and even decisions of this Court.

Finally, both defendants relied heavily upon the case of Harris v. Whiteman, 243 F.2d 563 (5th Cir. 1957), in their district court supporting memoranda. That case involved the mysterious disappearance of a laborer who drowned. There was no evidence how the accident happened. The Fifth Circuit Court of Appeals affirmed the lower court's decision, as it has done in the instant case, holding there was no evidence of negligence.

This Court specifically reversed and remanded that case in Butler v. Whiteman, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958) on the very issue in question. This Court held

> That the evidence presented an evidentiary basis for jury findings as to
>
> (1) whether the tug was in navigation,
>
> (2) whether the deceased laborer was a seaman and member of the crew, and
>
> (3) whether the defendant's negligence was responsible for the laborer's death.

In their district court memoranda, the defendants stated that Harris was on "all fours" with the instant case. Defendants retracted their position when notified by petitioner that Harris had been reversed specifically on the issue presented here. Their initial reliance on that case as being factually similar illustrates the marginal nature of this case, a case which the majority of the above cited jurisprudence would preserve for jury resolution.

This Court and most circuits have recognized when a seaman's death is mysterious and his burden of proof is so featherweight, the only proper way to decide the negligence issue is to allow an impartial panel of jurors to base their decision on recognized grounds using permissible inferences, speculation and conjecture. Landry, supra at 143. Without allowing the jury to consider the factual inferences, petitioner is deprived of her opportunity to have her claim completely adjudicated on its merits, in contrast to the Fifth Circuit's affirmation of the case's dismissal using the erroneous pretrial standard of proof applied below.

CONCLUSION

As the prevailing jurisprudence indicates a jury is given a wide latitude in resolving negligence issues in cases involving the mysterious drownings of seamen. The cases cited above illustrate that the Fifth Circuit has steered its own path in using a higher burden of proof standard in seamen cases by affirming the granting of summary judgment, thereby taking away plaintiff's featherweight burden of proof.

Most circuits agree that it is the function of the jury to resolve inconsistent and uncertain inferences, and that the jury is permitted to infer facts from unexplained events when rendering its decision. In the instant case, the jury should have been entitled to examine and observe the witnesses, testimony, and evidence in order to determine liability.

The reason for having the Jones Act "featherweight" burden of proof is that the jury may be presented with all factual circumstances and then resolve the issues based upon permissible inferences. These inferences are what the Fifth Circuit has denied plaintiff in the instant case. Without employing the light standard and allowing the issues of negligence to go before the jury, this Court would place the unreasonable burden on plaintiffs to prove their case to the judge using accepted circumstantial facts as in mysterious drowning cases. This burden directly challenges the prevailing mandate set by both the Jones Act and general maritime law followed by most circuits and this Court. Without recognizing and applying the light standard to this case, the view of the majority of the circuit courts would become a useless body of law.

Therefore, Mrs. Abshire respectfully requests that this Court grant this Writ and acknowledge the error of the Fifth Circuit and the District Court by remanding this case for a full trial on the merits.

APPENDIX I

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF COOPER T. SMITH STEVEDORING COMPANY, INC., d/b/a TERRENCE DERRICK & LIGHTERAGE CO., INC. AS OWNER AND OPERATOR OF THE D/B KEVIN, PRAYING FOR EXONERATION FROM AND/OR LIMITATION OF LIABILITY	CIVIL ACTION NO. 88-4058 c/w 88-4737 and 89-0583 SECTION "I" (3)

ORDER AND REASONS

This matter comes before the Court on the motions of defendants, Cooper/T. Smith Stevedoring Company, Inc. ("Cooper/T. Smith"), Gnots-Reserve, Inc. ("Gnots"), and American Commercial Barge Lines Company ("ACBL") for summary judgment. After reviewing the motions, memoranda of counsel, the record and the law, the Court grants the motions for the reasons set forth below.

FACTS

Donald Abshire, the decedent, was employed by Cooper/T. Smith as a crane operator aboard the D/B KEVIN on February 19, 1988. The D/B KEVIN was owned by Cooper T. Smith. On that date, the D/B KEVIN was discharging steel coils from the S/S PARASKEVI to various barges owned by American Commercial Barge Lines near Ama, Louisiana. The S/S PARASKEVI was anchored at mid-river with its bow upriver

and the D/B KEVIN moored to its starboard side. Three river barges, the ACBL-2892, ACBL-1403, and ACBL-1323 were moored side by side respectively to the port side of the D/B KEVIN, in order to facilitate discharge of the cargo.

About 4:30p.m. on February 19, 1988, a co-worker, Darrel Gonsoulin, approached Abshire near the bow of the D/B KEVIN on the side away from the S/S PARASKEVI and closest to Barge ACBL-2892. A short conversation ensued, and Abshire told Gonsoulin he was "going to catch a line" and proceeded to walk off the D/B KEVIN and across the head of Barge ACBL-2892. Gonsoulin stated that he stood near an operating motorized wench during this time, which blocked out other sounds from his hearing. Gonsoulin further stated that the last time he saw Abshire was when Abshire was walking onto and across the head of that barge. Another co-worker, Robert Smith, also last spotted Abshire walking across Barge ACBL-2892. No one else saw or spoke with Abshire after that time.

Earlier in the afternoon on February 19, 1988, the M/V GNOTS I, captained by Andrew Sherman, brought up the ACBL-1323 to be spotted in the third position as described above. After the ACBL-1323 was spotted to the ACBL-1403, the GNOTS I moved the bow of the pushboat near the stern of ACBL-2892 in preparation for removing the barge from its first off position. Captain Sherman stated in his deposition that as the GNOTS I moved into position it neither bumped, hit nor jarred the ACBL-2892. In fact, the push knees of the GNOTS I never came in contact with the ACBL-2892 because of accumulated driftwood around the stern of the barge. Captain Sherman further stated that once the GNOTS I was faced up to the ACBL-2892 and all Cooper/T. Smith personnel had disembarked he began to back the barge out of its first off position. At all times pertinent, Captain Sherman had a full view of the deck of the ACBL-2892 and he never saw anyone slip or fall. He never saw Donald Abshire, whom he stated he could recognize on sight. According

to the Cooper/T. Smith workers who last saw Abshire, he was last seen walking across the ACBL-2892 prior to the time that the GNOTS I began to move the barge out of its first off position. Apparently, when the GNOTS I began to move the ACBL-2892 away from its first off position, Gonsoulin and Smith realized that Abshire was missing. At that time, Gonsoulin walked over all three barges trying to find Abshire and then he walked back to the D/B KEVIN. At that point, Captain Sherman had stopped moving the barge. Once Gonsoulin had disembarked the ACBL-2892, Captain Sherman continued moving the barge out of its first off position.

After Abshire became missing, an immediate search of the area was undertaken by Cooper/T. Smith and others, including the United States Coast Guard. However, Abshire was not found in or on any of the vessels or in the water. The persons who searched the vessels and walked across the barges after Abshire's disappearance did not find any condition of the ACBL-2892 that would have indicated Abshire might have slipped or fallen into the water. Discovery in this matter is now complete and no one who has been deposed knows what happened to Abshire on February 19, 1988. His body was recovered in the Mississippi River some four months later. A subsequent autopsy determined the cause of death to be asphyxia by drowning.

ANALYSIS

The claims of Mrs. Abshire against Cooper/T. Smith are based on allegations that Cooper/T. Smith was either negligent under the Jones Act or that the D/B KEVIN was unseaworthy. Mrs. Abshire's claims against Gnots-Reserve, Inc. and American Commercial Barge Lines are based on negligence under the General Maritime law. All three actions were consolidated into Cooper/T. Smith's limitation action. After the

present motions were filed, the claimant indicated in her consolidated opposition memorandum that she did not oppose the motion filed by ACBL, and she indicated her desire to voluntarily dismiss ACBL from the suit. Accordingly, this order addresses the remaining claims against Cooper/T. Smith and Gnots.

Summary Judgment Standards

In a Jones Act case the burden of the plaintiff to prove causation is "very light." Landry v. Two R. Drilling Co., 511 F.2d 138, 142 (5th Cir. 1975). The jury is entitled to make permissible inferences from unexplained events. Johnson v. United States, 333 U.S. 46, 49 (1948). In other words, the standard for negligence under the Jones Act is causation "even the slightest, in producing the injury." Landry v. Oceanic Contractors, Inc., 731 F.2d 299, 302 (5th Cir. 1984) (citation omitted).

Negligence under the General Maritime Law involves a different standard for negligence. See Schoenbaum, Admiralty and Maritime Law Section 4-2, at 124-26. The plaintiff must demonstrate that there was a duty owed by defendant to plaintiff, breach of a duty, prejudice sustained by plaintiff, and a causal connection between defendant's conduct and plaintiff's prejudice. Id. at 124. The duty owed is one of ordinary care under the circumstances. Daigle v. Point Landing, Inc., 616 F.2d 825 (5th Cir. 1980). Furthermore, the resultant harm must be reasonably foreseeable. Id.

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). However, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence

of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322 (emphasis added). Under the Jones Act, a complete absence of proof of an essential element of the nonmoving party's case warrants a grant of summary judgment. Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547, 549 (5th Cir. 1987) (citation omitted). "[T]he movant may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent." Fontenot v. Upjohn Co., 780 F.2d 1190, 1196 (5th Cir. 1986) (citation omitted).

The standard for granting summary judgment mirrors the standard for granting a directed verdict. Anderson v. Liberty Lobby, 477 U.S. 242, 250 (1986). Under the General Maritime Law, therefore, summary judgment is appropriate where "the facts and inferences point so strongly and overwhelmingly in favor of [the moving] party that the court believes that reasonable men cannot arrive at a contrary [conclusion]. . . ." Thornton v. Gulf Fleet Marine Corp., Inc., 752 F.2d 1074, 1076 (5th Cir. 1985). By comparison, summary judgment in a Jones Act case is evaluated under a much stricter standard, and granting summary judgment in a Jones Act case is appropriate only when there is a complete absence of probative facts with regard to an essential element of the plaintiff's case. See id.

The Court finds that, regardless of the standard applied, summary judgment is appropriate in the present case because the plaintiff can produce no proof of causation against either Cooper/T. Smith or Gnots. With regard to the unseaworthiness claim, it is undisputed that Abshire was last seen walking across the bow of the barge ACBL-2892. It is unknown whether Abshire went into the water from the ACBL-2892, ACBL-1403, or the ACBL-1323. However, it is not disputed that Abshire did not go into the water from the D/B KEVIN. Therefore, Abshire's disappearance could not have

resulted from a condition of that vessel. And, as stated previously, the owner of the barges, ACBL, has been voluntarily dismissed by the claimant, so no unseaworthiness claims exists against ACBL.

With respect to negligence, based on the undisputed facts there is absolutely no indication of causation, even slight, by either Cooper/T. Smith or Gnots. The uncontested evidence indicates that the GNOTS I in no way came in contact with, bumped or jarred the ACBL-2892 in such a manner to have caused Abshire to be thrown from the deck of the barge. There was no condition of either the vessel or the barges which would have indicated where Abshire might have slipped and fallen. In short, no one knows what happened to Abshire.

The claimant raises the notion that since Abshire's body was found without a life vest a material fact is at issue pertaining to whether rules and regulations regarding life preservers were adequate aboard the D/B KEVIN, particularly since workers are allowed to use their own work vests instead of company issued models. Alternatively, claimant states that the work vests issued by Cooper/T. Smith were defective. However, testimony indicates that workers could only use their own life vests if they were Coast Guard approved. Furthermore, uncontested testimony indicates that Abshire voluntarily took off his work vest around 1:00p.m. the day he disappeared. No one remembers if Abshire put his work vest back on prior to his disappearance.

The Court finds that claimant's allegations regarding the work vest do not raise a material issue of contested fact. Indeed, there is no genuine issue as to any material fact in this case. Discovery is closed, and claimant has simply not been able to demonstrate either negligence or a causal link between a condition of the vessels and Abshire's disappearance.

Accordingly,

IT IS ORDERED that:

(1) The motions of Cooper/T. Smith, Gnots-Reserve, Inc., and American Commercial Barge Lines for summary judgment are GRANTED, and the claimant's claims against these defendants are hereby DISMISSED WITH PREJUDICE, each party to bear their own costs; and

(2) The hearings set in these matters for July 18, 1990 are CANCELLED.

New Orleans, Louisiana, this 19th day of July, 1990.

(SIGNED) HENRY A. MENTZ, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX 2

In re COOPER/T. SMITH, et al.

Elizabeth Ross ABSHIRE, etc.,
Plaintiff-Appellant,

v.

GNOTS-RESERVE, INC., et al.
Defendants-Appellees.

Sandra Marie CORMIER, etc., Plaintiff,

v.

AMERICAN COMMERCIAL LINES, ET al., Defendants.

No. 90-3619
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 30, 1991

Before JOHNSON, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

Plaintiff, Elizabeth Abshire,[1] the widow of Donald Abshire, seeks review of the district court's grant of summary judgment in favor of defendants, Cooper/T. Smith and Gnots-Reserve claiming that a genuine issue of fact remains as to the cause of her husband's disappearance and subsequent drowning death. Having viewed the summary judgment evidence in the light most favorable to Mrs. Abshire, we agree with the district court that there is a complete absence of proof to establish unseaworthiness, causation or negligence on the party of any of the defendants. Therefore, we affirm the district court's grant of summary judgment to the defendants.

I.

In September 1988, Cooper/T. Smith Stevedoring Company (Cooper), d/b/a Terrence Derrick & Lighterage Co., filed a complaint pursuant to the Limitation of Liability Act, 46 U.S.C. App. Section 183, et seq., seeking exoneration from or limitation of liability for possible claims arising out of the disappearance and drowning death of Donald Abshire, a crane operator who was working aboard its vessel, the D/B KEVIN on the day he disappeared. Elizabeth Abshire filed a claim in the limitation action against Cooper claiming that Cooper was either negligent under the Jones Act or that the D/B KEVIN was unseaworthy. Mrs. Abshire also filed third party claims against American Commercial Barge Line (ACBL) and Gnots-Reserve Towing,

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[1] A separate claim was filed by Abshire's first wife, Sandra Cormier, as mother of the sole surviving child of Donald Abshire. That claim was settled and is not subject to this appeal. Therefore, we address only the claims of Elizabeth Abshire.

Inc. (Gnots) claiming that both parties were negligent under general maritime law.

Cooper, Gnots and ACBL all filed motions for summary judgment, seeking dismissal of all claims asserted by Mrs. Abshire. Mrs. Abshire did not oppose the motion filed by ACBL and voluntarily dismissed that party from the suit.

The district court granted Cooper's and Gnots' motions for summary judgment and dismissed Mrs. Abshire's complaint with prejudice. Mrs. Abshire timely appeals.

II.

Donald Abshire was employed by Cooper as a Jones Act seaman aboard the D/B KEVIN. Abshire's duties included operating an onboard crane, handling lines, securing barges, and assisting the movement of the barges in the flotilla. On February 19, 1988, the D/B KEVIN was discharging steel coils from the S/S PARASKEVI onto three river barges, the ACBL-2892, ACBL-1403 and ACBL-1323, which were moored to the port side of the D/B KEVIN in first-off, second-off and third-off positions respectively. As the barges were loaded, they were removed from the flotilla by the pushboat GNOTS I which was owned and operated by Gnots and piloted by Captain Andrew Sherman.

At about 4:00 p.m. on February 19, a co-worker, Darrel Gonsoulin, walked up to Abshire on the D/B KEVIN and talked to him for several minutes. Abshire told Gonsoulin that he was "going to catch a line" and proceeded to walk off the D/B KEVIN and across the head of the first-off barge, ACBL-2892. After having spoken with Abshire, Gonsoulin went to man the winch in preparation for movement of the first-off barge. The winch

was motorized and the noise blocked out all other sounds. Another co-worker, Robert Smith, stated he last saw Abshire walking across the head of Barge ACBL-2892. No one saw or spoke to Abshire after that time.

At approximately the same time, the GNOTS I brought the barge ACBL-1323 alongside to be spotted in the third-off position next to the ACBL-1403. Once the ACBL-1323 was spotted, Captain Sherman moved the bow of the GNOTS I near the stern of the ACBL-2892 in preparation for removing the barge from its first-off position. Captain Sherman stated that as the GNOTS I moved into position, it neither bumped, hit nor jarred the ACBL-2892 while the barge was moored in the first-off position to the D/B KEVIN. In fact, the push knees of the GNOTS I never came in contact with the ACBL-2892 because of accumulated driftwood around the stern of the barge. Captain Sherman stated that no problems were created by facing up the GNOTS I to the barge with the debris between its nose and the stern of the barge. Once the pushboat was faced up to the barge and all Cooper personnel had disembarked, Captain Sherman began to back the barge out of position. At all times pertinent, Captain Sherman had full view of the deck of the ACBL-2892 and never saw anyone slip and fall, including Abshire, whom he stated he knew on sight.

According to the Cooper workers who last saw Abshire, he was last seen walking across the ACBL-2892 prior to the time that the GNOTS I began to move the barge out of position. It was not until that barge began to move that Gonsoulin and Smith realized that Abshire was missing. Gonsoulin jumped aboard the ACBL-2892 to search for Abshire. He also searched barges ACBL-1403 and 1323. Gonsoulin then walked back across ACBL-2892, which had stopped moving once Captain Sherman realized men were aboard the barge. Once Gonsoulin had disembarked the ACBL-2892, Captain Sherman resumed back-

ing the vessel out of position, apparently unaware that Abshire was missing.

After Abshire's absence was noticed, an immediate search of the area was undertaken by Cooper personnel and others, including the United States Coast Guard. Abshire was not found in or on any of the vessels or in the water. The persons who searched the vessels and walked across the barges found no condition that would indicate that Abshire might have slipped or fallen into the water.

Abshire's body was recovered in the Mississippi River some four months later. When found, his body did not have on a life preserver. Abshire's cause of death was asphyxia by drowning. The Coast Guard investigated the incident and reported that there was no evidence of culpability for the accident. Even now, no one knows what happened to Abshire on the date he disappeared.

III.

The district court granted summary judgment in favor of the defendants stating that summary judgment was proper because the plaintiff produced no proof of the causation against either Cooper or Gnots. On appeal, Mrs. Abshire argues that the facts, if viewed in the light most favorable to her, indicate a causal relationship between the movements of the barge and the drowning of Abshire. Mrs. Abshire contends that because the standard of proof is so low in Jones Act cases and there is a reasonable inference that the negligence of Cooper or Gnots or both caused her husband's death, summary judgment was improper.

Scope of Review

This court reviews the grant of summary judgment motion de novo, using the same criteria used by the district court in the first instance. Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988). We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986) (per curiam). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Material facts" are "facts that might affect the outcome of the suit under the governing law." Id.

Jones Act and Maritime Negligence

[1] The burden to prove causation in a Jones Act case is "very light" or "feather-weight." Landry v. Two R. Drilling Co., 511 F.2d 138, 142 (5th Cir. 1975). Under the Jones Act, a defendant must bear the responsibility for any negligence, however slight, that played a part in producing the plaintiff's injury. See Landry v. Oceanic Contractors, Inc., 731 F.2d 299, 302 (5th Cir. 1984). Although in Jones Act cases a "jury is entitled to make permissible inferences from unexplained events," summary judgment is nevertheless warranted when there is a complete absence of proof of an essential element of the nonmoving party's case. See Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547, 549 (5th Cir. 1987).

[2] The standard for negligence under general maritime law is higher. The plaintiff must demonstrate that there was a duty owed by the defendant to the plaintiff, breach of that duty, injury sustained by plaintiff,and a causal connection between defendant's conduct and the plaintiff's injury. See Thomas v. Express Boat Co., 759 F.2d 444, 448 (5th Cir. 1985). Furthermore, the resultant harm must be reasonably foreseeable. Daigle v. Point Landing, Inc., 616 F.2d 825, 827 (5th Cir. 1980).

Maritime Negligence Claims
Against Gnots

[3] Mrs. Abshire argues that the movements of the GNOTS I when facing up to and attempting to remove the debris from in front of the pushboat, without notice of warning to the employees in the area, creates a reasonable inference that the GNOTS I bumped or jolted the ACBL-2892 as Abshire was preparing the barge for movement, thereby causing his fall. The undisputed evidence however reveals that the GNOTS I never came in contact with barge ACBL-2892, nor were any maneuvers aimed at removing the debris between the vessels begun until after the barge was moved away from the D/B KEVIN. As noted above, the Captain of the GNOTS I testified that during the entire time he was maneuvering his vessel to remove barge ACBL-2892 from its first off position, he had full view of the barge and never saw Abshire. In the face of this evidence, Mrs. Abshire presented no evidence that Abshire was even on barge ACBL-2892 when the GNOTS I was maneuvering into position, or that Abshire was on that barge when he fell. There is thus no evidence whatsoever to raise an inference, much less to show, that operation of the GNOTS I negligently caused Abshire's fall. Therefore, summary judgment in favor of Gnots was proper.

Jones Act Negligence and Unseaworthiness Claims Against Cooper

[4, 5] For Mrs. Abshire to prevail on her claims that the D/B KEVIN was unseaworthy, she must show that the vessel breached its warranty of seaworthiness, and that the resulting injury was caused by that unseaworthy condition. Johnson v. Offshore Express, Inc., 845 F.2d 1347, 1354 (5th Cir. 1988). As the district court properly noted, it is undisputed that Abshire did not go into the water from the D/B KEVIN. All of the witnesses agree that Abshire was last seen walking away from the D/B KEVIN across the bow of the ACBL-2892. As Abshire could not have fallen from the D/B KEVIN, there is no basis in fact for Mrs. Abshire's claim that an unseaworthy condition existed on the D/B KEVIN causing her husband to fall.

[6] Mrs. Abshire argued to the district court that, because her husband's body was found without a life vest, a material issue of fact existed pertaining to whether rules and regulations regarding life preservers were adequate aboard the D/B KEVIN, particularly because the workers are allowed to wear their own vests instead of the company-issue models. Alternatively, Mrs. Abshire argued, the life vests issued by Cooper were defective. Whether she was arguing that such conditions rendered the D/B KEVIN unseaworthy, see Vargas v. McNamara, 608 F.2d 15, 18 (1st Cir. 1979) (unseaworthiness can be manifested by an unsafe method of work, such as the failure by the shipowner to provide adequate equipment), or was claiming such deficiency or defect amounted to Jones Act negligence is irrelevant; neither contention raises a material issue of fact.

The record reveals that Cooper had a company policy requiring all employees to use United States Coast Guard approved life vests when working. As long as the life jacket was Coast Guard approved, a worker could wear a jacket which either

he or the company provided. Furthermore, the undisputed testimony reveals that on the day Abshire disappeared, he had been wearing a Coast Guard approved life vest but had voluntarily taken it off around 1:00 p.m. None of the witnesses could recall if he had redonned the vest prior to his disappearance.

Mrs. Abshire presented no evidence that the life jacket worn by her husband on that day or the life vests provided by Cooper were defective in any way. The undisputed testimony reveals that Cooper's life vest policy was adequate to safeguard its workers. Therefore, Mrs. Abshire's claims that Cooper's life vest policy was inadequate or that the vests were defective are not supported by the evidence, and thus raise no genuine issue of fact. As there is no evidence, circumstantial or otherwise, to establish that the D/B KEVIN was unseaworthy, or that Cooper acted negligently or in any way caused Abshire's death, there is a complete absence of proof of these essential elements. Therefore, summary judgment was proper.

Mrs. Abshire raised no other theory in the district court to support her claims for Jones Act negligence. On appeal, she argues for the first time that Cooper had the duty to supervise Gnots in its movement of the ACBL vessels. As this argument was never raised in the district court it cannot be raised for the first time on appeal. See Capps v. Humble Oil & Ref., Co., 536 F.2d 80, 82 (5th Cir. 1976); Coleman v. Associated Pipeline Contractors, Inc., 444 F.2d 737, 740 (5th Cir. 1971). Therefore, we shall not consider any arguments based on Mrs. Abshire's theory of liability through failure to supervise.

CONCLUSION

In an attempt to convince this court that summary judgment is improper in "missing seamen" cases, Mrs. Abshire argues that "speculation, conjecture and possibilities suffice to support a jury verdict." Landry, 511 F.2d at 143 n. 2 (Gee, J. Concurring). Thus she posits, as there is no direct evidence to contradict her theories of how her husband died, a jury should be allowed to determine the facts. She cites several missing seamen cases to support this proposition. See, e.q., Butler v. Whiteman, 356 U.S. 271, 78 S.Ct 734, 2 L.Ed.2d 754 (1958); Landry, 511 F.2d 138; Admiral Towing Co. v. Woolen, 290 F.2d 641 (9th Cir. 1961); Gaymon v. Quinn Menhaden Fisheries of Texas, Inc., 118 So.2d 42 (Fla. App. 1960). But each cited case is factually distinguishable from the instant case; in each, the jury's "speculation or conjecture" was based on direct or strong circumstantial evidence to support a reasonable inference that the vessel was negligent or unseaworthy. As we stated in Martin, when the causal link between the alleged negligence and the decedent's death is too speculative to draw a reasonable inference that the negligence played a part in the seaman's disappearance, summary judgment is appropriate. See Martin, 819 F.2d at 550. No evidence, either direct or circumstantial, exists in the instant case to show that either Cooper or Gnots were in any way responsible for Abshire's drowning. All we are given are unsupported suppositions which are inadequate to overcome summary judgment despite the Jones Act's featherweight burden of proof.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

(2)

NO. 91-188

In the Supreme Court of the United States

OCTOBER TERM, 1991

ELIZABETH ROSS ABSHIRE,
PETITIONER

VERSUS

GNOTS-RESERVE, INC. AND
COOPER/T. SMITH STEVEDORING COMPANY, INC.,
D/B/A TERRENCE DERRICK
& LIGHTERAGE CO., INC.,
AS OWNER AND OPERATOR OF THE D/B KEVIN,
AND GNOTS-RESERVE, INC.,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONER'S "QUESTION PRESENTED FOR REVIEW"

Mrs. Elizabeth Abshire (hereinafter "Mrs. Abshire") has characterized the question presented for review as follows:

> Whether the Fifth Circuit has challenged the clear mandate set by the Jones Act and general maritime law when it abolished a seaman's right to use a "featherweight" standard of proof which includes a very low evidentiary threshold for submission of facts to a jury, by its refusal to use the prevailing summary judgment standard used by a majority of the circuits and this Court in Jones Act cases involving mysterious seamen drownings.

This phraseology by Mrs. Abshire incorrectly states that the U.S. Fifth Circuit did not apply the "featherweight" standard of proof, and suggests that this has created a conflict among the circuits. This is not correct. In particular, the U.S. Fifth Circuit specifically stated as follows:

> The burden to prove causation in a Jones Act case is "very light" or "feather-weight". *Landry v. Two R. Drilling Co.*, 511 F.2d 138, 142 (5th Cir. 1975). Under the Jones Act, a defendant must bear the responsibility for any negligence, however slight, that played a part in producing the plaintiff's injury. *See Landry v Oceanic Contractors, Inc.*, 731 F.2d 299, 302 (5th Cir. 1984).

In re Cooper/T. Smith (Abshire v. Gnots-Reserve, Inc.), 929 F.2d 1073, 1076 (5th Cir. 1991), appearing in petitioner's Appendix to Petition at A-13. Given this language, it is ludicrous for Mrs. Abshire to argue that the Fifth Circuit

abolished a seaman's right to use a "featherweight" standard of proof.

The United States Fifth Circuit affirmed the factual determination of U. S. District Judge Henry Mentz that there was a *total absence* of proof of causation, negligence and unseaworthiness. In that regard, the United States Fifth Circuit held:

> As there is *no evidence,* circumstantial or otherwise, to establish that the D/B KEVIN was unseaworthy, or that Cooper acted negligently or in any other way caused Abshire's death, there is a complete absence of proof of these essential elements. Therefore, summary judgment was proper. (Emphasis added)

In re Cooper/T. Smith, 929 F.2d at 1078, appearing in petitioner's Appendix to Petition at A-16.

This Court should note, preliminarily, that there is no basis for the argument of Mrs. Abshire that the District Court and the Fifth Circuit applied the wrong evidentiary standard, because both Courts found that there was a *total absence* of proof by petitioner against Respondents, Cooper/T. Smith Stevedoring Company, Inc. (hereinafter "Cooper") and Gnots-Reserve, Inc. (hereinafter "Gnots"). Therefore, *there is no question presented for review.*

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STATUTES:

STATEMENT OF THE CASE

On February 19, 1988, Donald Abshire (hereinafter "Mr. Abshire") was one of two crane operators working aboard the D/B KEVIN, a derrick barge which was discharging a cargo of rolled steel coils from the S.S. PARASKEVI into river barges at a mid-river anchorage near Ama, Louisiana. The starboard side of the D/B KEVIN was moored to the starboard side of the S.S. PARASKEVI, a bulk carrier which was anchored at mid-river. The bow of the S.S. PARASKEVI was pointed upriver; the bow of the D/B KEVIN was pointed downriver. Three river barges, which were used to receive and transport the steel coils, were moored to the port side of the D/B KEVIN. Those barges included Barge ACBL-2892, which was first off; Barge ACBL-1403, which was second off; and Barge ACBL-1323, which was third off. The position of the vessels is more fully set forth in a hand-written diagram prepared by Darrel Gonsoulin, which has been lodged in the record of this matter. Mr. Gonsoulin, a co-employee of Mr. Abshire, was one of the last persons to see Mr. Abshire before his disappearance.

The D/B KEVIN had completed its loading of Barge ACBL-2892 before the disappearance of Mr. Abshire, and the M/V GNOTS I, an inland pushboat, was in the process of pulling Barge ACBL-2892 out from between the D/B KEVIN and Barge ACBL-1403 around the time of the disappearance of Mr. Abshire.

Shortly before Mr. Abshire's disappearance, Gonsoulin had walked up to Mr. Abshire to "bum a cigarette" and was talking with Mr. Abshire near the upriver corner of the D/B KEVIN on the side away from the S.S. PARASKEVI and closest to Barge ACBL-2892 and the other two cargo barges. Mr. Abshire told Gonoulin that he

was "going to catch a line", and, at that time, Mr. Abshire walked off the D/B KEVIN across the head of Barge ACBL-2892 toward Barges ACBL-1403 and ACBL-1323. Gonsoulin did not know whether the line Mr. Abshire was going to catch was located on Barge ACBL-1323, ACBL-1403 or ACBL-2892. Robert Smith, another co-employee of Mr. Abshire, saw Mr. Abshire walking across the head of Barge ACBL-2892 and no one saw or spoke with Mr. Abshire after that time.

It is unknown whether Mr. Abshire reached the line which he was going to "catch" or what cargo barge he was located on at the time of his disappearance. Around this time, Captain Andrew Sherman, the pilot of the M/V GNOTS I, prepared to move Barge ACBL-2892 from its position, but neither bumped it nor jarred ACBL-2892. (*See In re Coper/T. Smith*, 929 F.2d at 1075, appearing in petitioner's Appendix to Petition at A-11.) In fact, the pushknees of the M/V GNOTS I never came in contact with Barge ACBL-2892 because of driftwood that had accumulated around the stern of the barge. Once the M/V GNOTS I faced up to Barge ACBL-2892 and Captain Sherman saw that no Cooper personnel were on the deck of the barge, he began backing the barge up and out of its position alongside the D/B KEVIN. At this time, Captain Sherman had full view of the deck of Barge ACBL-2892 and never saw anyonne slip or fall, including Mr. Abshire, who he knew by sight. (*See In re Cooper/T. Smith*, 929 F.2d at 1076, appearing in petitioner's Appendix to Petition at A-11.)

Within five minutes of the time Mr. Abshire was last seen, his co-employees noticed he was missing and conducted an immediate search of the area. The United States Coast Guard was promptly notified and assisted in the search; however, Mr. Abshire could not be located. Mr.

Abshire's body was recovered in the Mississippi River some four months later, and, at the time his body was found, no life preserver was present. To this date, no one knows what happened to Mr. Abshire on the date he disappeared, why he went into the water, or even which cargo barge he was located on at the time he went into the water. (*See In re Cooper/T. Smith*, 929 F.2d at 1076, appearing in petitioner's Appendix to Petition at A-12.)

It is undisputed that Mr. Abshire walked off of the D/B KEVIN with no difficulty as was last seen walking away from the D/B KEVIN (the only vessel owned or operated by Cooper) prior to his disappearance. An inspection of all of the river barges produced no explanation for Mr. Abshire's disappearance. There were no defects present on the barges or any foreign substances on the decks. The cargo involved was steel coils which was a "clean" cargo which resulted in no debris being present. The only vessel movements were ordinary movements which were expected by all Cooper personnel, including Mr. Abshire.

Mr. Abshire was seen wearing his work vest or life preserver on the day of his accideant, although no one can state whether his life vest or life preserver was being worn at the time he went into the water because no one saw Mr. Abshire go into the water. Mr. Abshire's co-employees cannot recall whether he was wearing a work vest or life preserve at the time they last saw him; however, it is undisputed that Cooper's company policy is that work vests are required.

The sole basis of alleged culpability presented by Mrs. Abshire in the District Court was that Cooper was negligent in its company policy with regard to work vests. Under Cooper's company policy, an employee was provided with a *U. S. Coast Guard-approved* company work vest but could elect to use his own personal work vest, provided

it was *U. S. Coast Guard-approved.* Mrs. Abshire presented *no evidence* to suggest that there would be any difference between the performance of various U. S. Coast Guard-approved work vests, depending upon whether same were purchased by Mr. Abshire rather than Cooper. She also presented *no evidence* of any defect in the work vest used by Mr. Abshire on the date of his disappearance. (*See In re Cooper/T. Smith,* 929 F.2d at 1078, appearing in petitioner's Appendix to Petition at A-16.) No evidence was presented of any unseaworthiness and it is undisputed that Mr. Abshire's disappearance did not even occur from the D/B KEVIN or as a result of any of its equipment or personnel.

MISSTATEMENTS OF FACT BY MRS. ABSHIRE

In accordance with Rule 15.1 of the Supreme Court Rules, this Court should note that Mrs. Abshire has made the following misstatements of fact in addition to the misstatements set forth above in her "question presented":

Mrs. Abshire states that her husband *slipped* or *was thrown* from the deck of Barge ACBL-2892 into the Mississippi River *suddenly* and *without warning.* (*See* Petition, at p. 2.) This is not correct, and there is no evidence to support this conclusion. In fact, the Fifth Circuit found that no one knows what happened to Mr. Abshire and that "Mrs. Abshire presented no evidence that Mr. Abshire was even on Barge ACBL-2892 when the M/V GNOTS I was maneuvering into position, or that [Mr.] Abshire was on that barge" when he went into the water. (*See In re Cooper/T. Smith,* 929 F.2d at 1077, appearing in petitioner's Appendix to Petition at A-14.)

Mrs. Abshire's next misstatement is that the river barges were filled with "different materials". (*See* Petition,

at p. 2.) This is not correct. Each river barge received the same type of materials, i.e., rolled steel coils, which is a "clean" cargo. (*See In re Cooper/T. Smith,* 929 F.2d at 1075, appearing in petitioner's Appendix to Petition at A-10.)

Mrs. Abshire's next misstatement is that there was a conflict in the testimony between U. S. Coast Guard Officer William G. Wetherington (who issued a report finding that there was no culpability on behalf of Cooper or Gnots) and the testimony of Captain Sherman. (*See* Petition, at p. 3.) This is not correct. Officer Wetherington presented no testimony or affidavits in the District Court; however, his report was considered (a copy of which is included in Respondent's Appendix A) in accordance with *Beech Aircraft Corporation v. Rainey,* 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988). Mrs. Abshire is apparently arguing that there was a dispute as to when prop wash of the M/V GNOTS I was used to free certain debris during shifting operations. This alleged conflict in testimony does not have anything to do with Cooper who was neither the owner nor the operator of the M/V GNOTS I, Barge ACBL-1323, Barge ACBL-1403 or Barge ACBL-2892. In addition, as this Court can see from the report of Officer Wetherington (appearing in Respondent's Appendix A), Officer Wetherington never specifically addressed this issue in his report, and no other evidence from Officer Wetherington was considered by the Court.

The next misstatement of Mrs. Abshire is that she proved that Mr. Abshire fell from Barge ACBL-2892 rather than one of the other barges. Mrs. Abshire failed to establish this, based on the uncontroverted factual testimony of Captain Sherman, who stated that he recognized Mr. Abshire and that Mr. Abshire was not present on the deck of Barge ACBL-2892 at the time that he

pulled that barge out from between the D/B KEVIN and the second-off barge. (*See In re Cooper/T. Smith,* 929 F.2d at 1076, appearing in petitioner's Appendix to Petition at A-2, A-3, A-5 and A-6.)

SUMMARY OF ARGUMENT

The Petition For A Writ of Certiorari filed herein by Mrs. Abshire, does not present any legal or factural basis or other good cause to support either the granting of the requested writ or the need for briefs or argument on the merits. *See* Sup. Ct. R. 10.1 and 20. Mrs. Abshire argues that the wrong standard of proof was applied by the United States District Court for the Eastern District of Louisiana and the United States Fifth Circuit Court of Appeals; and then implies that there is some conflict between the Circuits concerning the issues presented. This is not correct. Both courts below properly found a *total absence* of proof by Mrs. Abshire of various essential elements of her claims. Supreme Court Rules 10.1 and 14.1(j) require that a petitioner specifically set forth the basis upon which the petitioner seeks a writ. There are no issues presented in Mrs. Abshire's brief which would provide good cause for this Court to take any further action other than summarily dismissing Mrs. Abshire's Petition.

ARGUMENT

Mrs. Abshire argues that speculation, conjecture and possibilities suffice to support a jury verdict based upon *Landry v. Two R. Drilling Company,* 511 F.2d 138 (5th Cir. 1975), and *Gibson v. Elgin, Joliet & Eastern Railway Company,* 246 F.2d 834, 836 (7th Cir. 1957), *cert. denied,* 355 U.S. 897, 78 S.Ct. 270,2 L.Ed. 193 (1957). (*See* Petition, at pp. 6-7.) This is not correct. *Tennant v. Peoria & P.U. RY. Co.,* 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944);

Martin v. John W. Stone Oil Distributor, Inc., 819 F.2d 547, 549 (5th Cir. 1987).

Landry and *Gibson* are not applicable because they are factually distinguishable from the Abshire case and because they involve a different type of "speculation" than involved in the Abshire case. In this regard, both *Landry* and *Guidry* discussed the United States Supreme Court case of *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740 (1946).

In *Lavender*, a railway worker was killed after being struck in the head with an object. *Direct evidence* showed that a mail hook rod of a railroad car was too low when that car passed very close to the decedent shortly before his death. The decedent's body was found very close to the railroad tracks with a fatal head injury. The testimony presented showed that the blow to the decedent's head was consistent with his being struck by a mail hook rod which was too low. The defendants in *Lavender* argued that the decedent had been mugged and that his head injury was caused by the blunt instrument of a mugger. The decedent had a gun which was dislodged from its holster at the time his body was found. A jury found that the plaintiff was injured as a result of being struck by the mail hook rod which was too low. The Missouri Supreme Court reversed the judgment that had been entered in accordance with the jury verdict. However, the U. S. Supreme Court reversed and reinstated the jury verdict, finding that *there was adequate direct and circumstantial evidence* for a jury to infer that the plaintiff had been killed as a result of being struck by the mail hook rod. The Supreme Court, in rendering its decision, stated:

> It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that

> fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence* of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. (Emphasis added)

Lavender, 327 U.S. at 653, 66 S.Ct. at 744.

In the instant case, there is *no evidence* to show what happened to Mr. Abshire and *no evidence* of any negligence on the part of Cooper, or any unseaworthiness of the D/B KEVIN, which in any way caused or contributed to Mr. Abshire's disappearance. In short, there is a *complete* absence of proof by Mrs. Abshire with respect to unseaworthiness, causation and the negligence of Cooper. (*See In re Cooper/T. Smith,* 929 F.2d at 1075, appearing in petitioner's Appendix to Petition at A-9.) In *Lavender,* on the other hand, the Court had substantial direct and circumstantial evidence to explain the reason for the decedent's death. Direct testimony established that the mail hook rod was too low. Circumstantial evidence included the position of the body and the size of the head wound. No similar direct or circumstantial evidence is present in this case.

The other two appellate court decisions relied upon by Mrs. Abshire with regard to speculation do not support her position. The Seventh Circuit opinion in *Gibson* quoted the above language from *Lavender* and allowed a plaintiff to testify and provide his own conclusions as to why he slipped on a foreigh substance in an office. *Gibson,* 246

F.2d at 836. In that case, the plaintiff was injured when he was moving equipment and testified that he must have slipped on pebbles which were allowed to accumulate because his employer negligently removed a mat used by workers to wipe their feet in an office. This obviously is not a missing seaman case and, therefore, *Gibson* has no applicability. Furthermore, *Gibson* is distinguishable because the plaintiff in *Gibson* presesnted direct testimony of what had occurred and explained why he thought it occurred.

The only other case that Mrs. Abshire cites in support of her argument with regard to speculation is *Landry,* which is likewise factually distinguishable. In *Landry,* a seaman was negligently struck on the hand by a co-employee, causing the loss of several fingers. After he was injured and only had the use of one hand, the toolpusher of his rig told him to go into the galley and watch television or, alternatively, if he wished, he could carry ice and root beers to his co-workers who were working in a nearby area. The plaintiff's immediate supervisor, the driller aboard the rig, contradicted the orders of the toolpusher and forced the plaintiff to work in a different area of the vessel, handling a high pressure hose which reequired use of both hands, in an area without proper handrails. According to expert testimony, this was done in violation of U. S. Coast Guard regulations. Circumstantial evidence demonstrated that the plaintiff fell overboard and drowned because he was forced to work with an injured hand, in direct violation of the instructions of the toolpusher, and due to defective handrails.

The opinion in *Landry* does not address speculation; however, in a concurring opinion, Judge Gee implied that he was skeptical of the correctness of the U.S. Supreme Court's comments concerning speculation, conjecture and possibilities. Nevertheless, when this Court reviews the

authorities cited by Mrs. Abshire, it is apparent that the type of "speculation and conjecture" discussed in *Lavender, Gibson* and *Landry* was not really speculation and conjecture at all. The verdicts were based upon strong, direct and circumstantial evidence, and the court in *Lavender* was only concerned with the limited measure of speculation which is required whenever facts are in dispute and reasonable jurors disagree. *Lavender,* 327 U.S. at 653, 66 S.Ct. at 744.

No material facts are in dispute in the Abshire case and there is a *total absence of proof* of negligence on the part of Cooper in connection with the disappearance of Mr. Abshire. In addition, with regard to unseaworthiness, Mr. Abshire departed from the D/B KEVIN and was walking across the head of Barge ACBL-2892 toward Barge ACBL-1403 and Barge ACBL-1323 when he was last seen. It is unknown whether Mr. Abshire went into the water from Barge ACBL-1403, Barge ACBL-1323 or Barge ACBL-2892; however, there is no doubt that Mr. Abshire never went into the water from the D/B KEVIN, the only vessel owned, operated or controlled by Respondent. (*See In re Cooper/T. Smith,* 929 F.2d at 1073, appearing in petitioner's Appendix to Petition at A-15.)

Mrs. Abshire has also cited certain cases dealing with missing seamen; however, none of those cases are applicable because all involve a specific *factual basis* for negligence or unseaworthiness. In *Admiral Towing Company v. Woolen,* 290 F.2d 641 (9th Cir. 1961), the vessel in question had no lifeboat, no life raft and no functioning ship-to-shore radio when it set out to sea with a two-man crew which included a 17 year old deckhand with no sea experience. *Woolen,* 290 F.2d at 643-44, 646. Expert testimony established that the foregoing constituted unseaworthiness.

In *Harris v. Whiteman*, 243 F.2d 563, 564 n.1 (5th Cir. 1957), *rev'd sub nom. Butler v. Whiteman*, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754 (1958), the vessel in question bad a bitt which was too low, which was used as a step to gain access to another vessel. Again, there was direct evidence of a defect in the vessel's equipment.

In *Gaymon v. Quinn Menhaden Fisheries of Texas, Inc.*, 118 So.2d 42 (Fla. App. 1960), a seaman had to answer the call of nature in a boat equipped with toilet facilities for the captain's use only and the decedent apparently fell overboard while he was attempting to relieve himself. *Gaymon*, 118 So.2d at 44. The evidence showed that the vessel owner was negligent in failing to allow a seaman to use the captain's toilet.

In *Landry v. Two R. Drilling Company*, after a plaintiff sustained an injury to one of his hands, he was ordered to handle a high pressure hose (which required the use of both hands) and was forced to work in an area of the vessel without adequate handrails, where he fell overboard.

In *Schulz v. Pennsylvania Railroad Company*, 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668 (1956), the evidence showed lack of lighting and personnel, and the plaintiff's body was found in the water with a flashlight still in his hand. Direct evidence proved a lack of lighting, and circumstantial evidence (his grip on the flashlight) showed causation between the lack of lighting and the accident.

Mrs. Abshire argues that, in *Daughenbaugh v. Bethlehem Steel Corp.*, 891 F.2d 1199 (6th Cir. 1989), the Sixth Circuit Court of Appeals held that the question of liability for a seaman's mysterious drowning should be left for the jury. *Daughenbaugh* dealt with a situation in which an intoxicated seaman disappeared from a dock

while being escorted back to his ship by officers of the ship. However, the facts also established that the ship had an unwritten policy that allowed drunken seamen to return to the vessel, and that seamen in that condition would be escorted in order to ensure their safety. *Id.* at 1208. Although the district court granted a motion for summary judgment filed on behalf of the vessel owner, the Sixth Circuit reversed, finding that there was conflicting testimony among the witneses and several genuine issues of material fact. *Id.* at 1209.

Mrs. Abshire also argues that the Sixth Circuit's reluctance to dispose of Jones Act claims through summary judgment was shared by the Fourth Circuit in *Van Horn v. Gulf Atlantic Towing Corp.*, 388 F.2d 636 (4th Cir. 1968). This is incorrect because *Van Horn* did not involve claims under the Jones Act or claims being asserted on behalf of a missing seaman. Furthermore, in *Van Horn*, the plaintiff alleged that he slipped on a slippery substance on the deck and there was direct evidence indicating that the substance was present. As such, the appeals court found that there were genuine issues of material fact, and held that summary judgment was inappropriate.

In contrast to the foregoing cases, there are no genuine issues of material fact, and there is no evidentiary basis to support any finding of negligence or unseaworthiness in the instant case. In fact, both lower courts found that there was a complete absence of proof with respect to Mrs. Abshire's claims. The District Court considered the opinion of Officer William G. Wetherington in accordance with *Beech Aircraft Corporation v. Rainey*, 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988); Fed. R. Evid. 803(8)(C). This opinion stated that there was "no evidence of culpability for this casualty". (*See* Respondent's Appendix A.) This conclusion of the U. S. Coast Guard was uncontroverted even after the parties exchanged expert reports.

The Circuits have consistently held that even though reasonable inferences can be determined by a jury, it is inappropriate for a jury to consider a missing seaman case where there is a "complete absence of proof of any essential element". *Martin v. John W. Stone Oil Distributor, Inc.*, 819 F.2d 547 (5th Cir. 1987).

In *Smith v. Reinauer Oil Transport, Inc.*, 256 F.2d 646 (1st Cir. 1958), *cert. denied*, 358 U.S. 889, 79 S.Ct. 133, 3 L.Ed.2d 117 (1958), a seaman became missing for reasons that could not be explained. Mrs. Abshire,similarly, has no evidence to explain why Mr. Abshire disappeared. The District Court granted the defendant's motion for directed verdict in *Smith* and the appellate court affirmed.

In *Swain v. Mississippi Valley Barge Line Company*, 244 F.2d 821 (3rd Cir. 1957), *cert. denied*, 355 U.S. 933, 78 S.Ct. 414, 2 L.Ed.2d 415 (1958), the District Court dismissed the complaint of the heirs of another missing seaman and the Third Circuit affirmed, finding that there was no evidence of causation. In the case at bar, there is no evidence of causation and no evidence of negligence or of unseaworthiness. There is no direct or circumstantial evidence to show why Mr. Abshire became missing or where he went into the water.

Mrs. Abshire argues that the jury should have been allowed to completely disregard the facts and find liability and causation by "inferences". The first inference which Mrs. Abshire argues should have been left up to the jury is that Cooper should have instructed or directed Captain Sherman or the M/V GNOTS I how to pull the barge in question out of position. Preliminarily, this Court should note that Cooper had no responsibility, obligation or duty to provide instructions to Captain Sherman. Essentially, Cooper was responsible for loading the barges, and the M/V GNOTS I and Captain Sherman were responsible for mov-

ing the barges. Moreover, this argument is merely an afterthought and was not even presented or preserved at the District Court level. (*See In re Cooper/T. Smith,* 929 F.2d at 1078, appearing in petitioner's Appendix to Petition at A-16.) As such, it cannot be raised for the first time on appeal.

The next "inference" is that Gnots was negligent by bumping the barge in question. Mrs. Abshire again requests that this Court allow the jury to disregard the facts, because there was no such sudden movement. (*See In re Cooper/T. Smith,* 929 F.2d at 1075, appearing in petitioner's Appendix to Petition at A-11.) Any such movement would be the responsibility of Gnots, rather than Cooper. However, employees of both companies were present and observed the movement of the barges and vessels in question, and the testimony of everyone verified that there was no unusual or sudden movement of the barges. Mrs. Abshire's suggesting that the jury be allowed to draw inferences from these facts would be an invitation to the jury to disregard the facts.

Mrs. Abshire next argues that the jury could have inferred that Cooper's life vest policy was inadequate, either because *Mr. Abshire could choose* between two U.S. Coast Guard-approved work vests or because *Mr. Abshire may have violated* Cooper's company policy by removing his work vest before he descended into the water. Under either scenario, there is no factual basis for a reasonable jury to conclude that Cooper was negligent, the D/B KEVIN was unseaworthy, or that either of the two caused or contributed to Mr. Abshire's death.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Fed.

R. Civ. P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party". *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Material facts" are "facts that might affect the outcome of the suit under the governing law...." *Id.*

Although a jury in a Jones Act case is entitled to make permissible inferences from unexplained events, summary judgment is nevertheless warranted when there is a complete absence of proof of an essential element of the nonmoving party's case. *Martin*, 819 F.2d at 549.

CONCLUSION

The facts and the inferences supporting those facts reveal no factual basis by which either Cooper or Gnots could be negligent or the D/B KEVIN could be unseaworthy. The District Court judge found that there was a *total absence* of proof of negligence, unseaworthiness and causation by Mrs. Abshire and granted Motions For Summary Judgment of Cooper and Gnots. The Fifth Circuit applied the featherweight standard of proof and the slightest degree of negligence test, and specifically found that there was a *total absence* of proof of these essential elements by Mrs. Abshire. Accordingly, the Fifth Circuit affirmed the District Court.

Mrs. Abshire has now submitted a brief to this Court disregarding the proceedings below and the legal standards applied by both Courts. Mrs. Abshire has neither presented a question involving a conflict between the Circuits or any other questions which would justify an exercise of judicial discretion of this Court pursuant to Supreme Court Rule 10.

For the above and foregoing reasons, the District Court and Appeals Court properly applied the law and, as such, the Petition of Elizabeth Ross Abshire For Certiorari to the United States Fifth Circuit Court of Appeals should be denied.

Respectfully submitted,

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Attorneys for respondent,
Cooper/T. Smith
Stevedoring Company, Inc.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari To Review A Judgment Of The United States Court Of Appeals For The Fifth Circuit by respondent, Cooper/T.Smith Stevedoring Company, Inc., has been forwarded to all counsel of record via the United States Postal Service, postage pre-paid and properly addressed on this ____ day of August, 1991.

GEORGES M. LEGRAND
DAVID M. FLOTTE

APPENDIX A

Commanding Officer (sio)
U.S. Coast Guard Marine
Safety Office

1440 Canal Street
New Orleans, LA 70112-2711
Phone: (504) 589-6251

16732
MC88001281/WGW
30 Aug 88

From: Investigating Officer, Coast Guard Marine Safety Office New Orleans
To: Commandant (G-MMI-1)
Via: Commanding Officer, Coast Guard Marine Safety Office New Orleans

Subj: DROWNING DEATH OF DONALD P. ABSHIRE, LAST SEEN ON FREIGHT BARGE ACBL 2892 (O.N. 565396) AT MILE 116 AHOP, LOWER MISSISSIPPI RIVER, ON 19 FEBRUARY 1988

1. The investigation of this casualty is complete. A narrative report will not be submitted.

2. The proximate cause of this casualty cannot be determined. It is probable that Mr. Abshire fell from the freight barge ACBL 2892 into the river while handling lines.

3. On 19 February 1988, Donald Abshire was the crane operator of the derrick barge KEVIN which was discharging cargo from the M/V PARASKEVI to barges at AMA Anchorage near St. Rose, Louisiana. The Kevin was

moored port side to the PARASKEVI and on its starboard side, the ACBL 2892, ACBL 1403 and ACBL 1323 were tied one side to another, respectively. These vessels were isolated from any access to the barge fleets moored alongside the river banks by at least 170 to 200 feet of water.

4. After the ACBL 2892 was loaded, Abshire and Robert Smith prepared to handle lines to allow the pushboat GNOTS I to move the loaded barge upriver. Darrell Gonsulin (crane operator for the FRANK L) came aboard the KEVIN for a smoke break and stood near the winch at the bow. Abshire had told Gonsulin he was going to handle a line between the two barges outboard of the KEVIN and Gonsulin assumed he meant the ACBL 1323 and the ACBL 1403. Abshire was last seen by Gonsulin and Smith on the bow of ACBL 2892 as he headed toward the ACBL 1403. He was missed 5 minutes later. No one saw Mr. Abshire leave any of the barges. An immediate search of the area was to no avail.

5. Acting on the presumption that Mr. Abshire fell, slipped or was knocked overboard, an extensive search was conducted by a Coast Guard vessel and aircraft and several other vessels in the area with negative results. Mr. Abshire's body was found on 16 june 1988 near AMA Anchorage.

16732
MC88001281/WGW
30 Aug 88

Subj: DROWNING DEATH OF DONALD P. ABSHIRE, LAST SEEN ON FREIGHT BARGE ACBL 2892 (O.N. 565396) AT MILE 116 AHOP, LOWER MISSISSIPPI RIVER, ON 19 FEBRUARY 1988

6. This investigation explored all items required to be addressed by 46 USC 6301. There is no evidence of culpability for this casualty. Additionally there is no evidence to suggest that drugs or alcohol were a factor. Therefore, it is recommended that this investigation be closed.

W. G. WETHERINGTON

Encl: (1) M/V GNOTS I Form CG-2692
(2) Robert Smith 1 Mar 88 Statement
(3) Darrell Gonsulin 2 Mar 88 Statement
(4) Captain Andrew Sherman 18 Jun 88 Telcon Summary
(5) I.O. Note dtd 27 Jun 88
(6) Donald P. Abshire Death Certificate

(sic)
Aug 31 1988

FIRST ENDORSEMENT

From: Commanding Officer, Coast Guard Marine Safety Office New Orleans
To: Commandant (G-MMI-1)

1. Forwarded approved.

A.W. KLOTZ

WETHERINGTON; wgt; 29AUG88;
[SIOYABSHIRE2LOT

APPENDIX B

U. S. Supreme Court Rules

Rule 10. Considerations Governing Review on Writ of Certiorari

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

U. S. Supreme Court Rules

Rule 14. Content of the Petition for a Writ of Certiorari

.1. The petition for a writ of certiorari shall contain, in the order here indicated:

(a) The questions presented for review, expressed in the terms and circumstances of the case, but without unnecessary detail. The questions should be short and concise and should not be argumentative or repetitious. They must be set forth on the first page following the cover with no other information appearing on that page. The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed, unless the names of all parties appear in the caption of the case. This listing may be done in a footnote. See also Rule 29.1 for the required listing of parent companies and nonwholly owned subsidiaries.

(c) A table of contents and a table of authorities, if the petition exceeds five pages.

(d) A reference to the official and unofficial reports of opinions delivered in the case by other courts or administrative agencies.

(e) A concise statement of the grounds on which the jurisdiction of this Court is invoked showing:

(i) The date of the entry of the judgment or decree sought to be reviewed;

(ii) the date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to file the petition for a writ of certiorari;

(iii) Express reliance upon Rule 12.3 when a cross-petition for a writ of certiorari is filed under that Rule and the date of receipt of the petition for a srit of certiorari in connection with wihich the cross-petition is filed; and

(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, setting them out verbatim, and giving the appropriate citation therefor. If the provisions involved are lengthy, their citation alone will suffice at this point and their pertinent text must be set forth in the appendix referred to in sub-paragraph .1(k) of this Rule.

(g) A *concise* statement of the case containing the facts material to the consideration of the questions presented.

(h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of

raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix, referred to in subparagraph .1(k) of this Rule.

(i) If review of a judgment of a United States court of appeals is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(j) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 10.

(k) An appendix containing, in the following order:

(i) The opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed.

(ii) Any other opinions, orders, findings of fact, and conclusions of law rendered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each

document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry.

(iii) Any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry.

(iv) The judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph.

(v) Any other appended materials.

If what is required by subparagraphs .1(f), (h), and (k) of this Rule to be included in or filed with the petition is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

.2. The petition for writ of certiorari and the appendix thereto, whether in the same or a separate volume, shall be produced in conformity with Rule 33. The Clerk shall not accept any petition for a writ of certiorari that does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 39.

.3. All contentions in support of a petition for a writ of certiorari shall be set forth in the body of the petition, as provided in subparagraph .1(j) of this Rule. No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief.

.4. The petition for a writ of certiorari shall be as short as possible and may not exceed the page limitations

set out in Rule 33.

.5. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

U. S. Supreme Court Rules

Rule 15. Brief in Opposition: Reply Brief; Supplemental Brief

.1. A brief in opposition to a petition for a writ of certiorari serves an important purpose in assisting the Court in the exercise of its discretionary jurisdiction. In addition to other arguments for denying the petition, the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition.

.2. The respondent shall have 30 days (unless enlarged by the court or a Justice thereof or by the Clerk pursuant to Rule 30.4) after receipt of a petition within which to file 40 printed copies of an opposing brief disclosing any

matter or ground as to why the case should not be reviewed by this Court. See Rule 10. The brief in opposition shall comply with Rule 33 and with the requirements of Rule 24 governing a respondent's brief, and shall be served as prescribed by Rule 29. A brief in opposition shall not be joined with any other pleading. The Clerk shall not accept a brief which does not comply with this Rule and with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 39. If the petitioner is proceeding *in forma pauperis*, the respondent may file 12 typewritten copies of a brief in opposition prepared in the manner prescribed by Rule 34.

.3. A brief in opposition shall be as short as possible and may not exceed the page limitations set out in Rule 33.

.4. No motion by a respondent to dismiss a petition for a writ of certiorari will be received. Objections to the jurisdiction of the Court to grant a writ of certiorari may be included in the brief in opposition.

.5. Upon the filing of a brief in opposition, the expiration of the time allowed therfor, or an express waiver of the right to file, the petition and brief in opposition, if any, will be distributed by the Clerk to the Court for its consideration. However, if a cross-petition for a writ of certiorari has been filed, distribution of both it and the petition for a writ of certiorari will be delayed until the filing of a brief in opposition by the cross-respondent, the expiration of the time allowed therefor, or an express waiver of the right to file.

.6. A reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner, but distribution and consideration by the Court under paragraph .5 of this Rule will not be delayed pending its filing. Forty copies of the reply brief, prepared in accordance

with Rule 33 and served as prescribed by Rule 29 shall be filed.

.7. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending calling attention to new cases or legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief must be restricted to new matter. Forty copies of the supplemental brief, prepared in accordance with Rule 33 and served as prescribed by Rule 29, shall be filed.

U. S. Supreme Court Rules

Rule 20. Procedure on a Petition for an Extraordinary Writ

.1. The issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

.2. The petition in any proceeding seeking the issuance by this Court of a writ authorized by 28 U.S.C. §§ 1651(a), 2241, or 2254(a), shall comply in all respects with Rule 33, except that a party proceeding *in forma pauperis* may proceed in the manner provided in Rule 39. The petition shall be captioned "*In re* [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14. All contentions in support of the petition shall be included in the petition.

The case will be placed on the docket when 40 printed copies, with proof of service as prescribed by Rule 29 (subject to subparagraph .4(b) of this Rule), are filed with the Clerk and the docket fee is paid.

.3. (a) A petition seeking the issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, shall set forth the name and office or function of every person against whom relief is sought and shall set forth with particularity why the relief sought is not available in any other court. There shall be appended to the petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and any other paper essential to an understanding of the petition.

(b) The petition shall be served on the judge or judges to whom the writ is sought to be directed and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges and the other parties may, within 30 days after receipt of the petition, file 40 printed copies of a brief or briefs in opposition thereto, which shall comply fully with Rule 15. If the judge or judges who are named respondents do not desire to respond to the petition, they may so advise the Clerk and all parties by letter. All persons served shall be deemed respondents for all purposes in the proceedings in this Court.

.4. (a) A petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the peti-

tion shall set forth specifically how and wherein the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U.S.C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted.

(b) Proceedings under this paragraph .4 will be *ex parte,* unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. A response, if ordered, shall comply fully with Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U.S.C. § 2241 (b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

.5. When a brief in opposition under subparagraph .3(b) has been filed, when a response under subparagraph .4(b) has been ordered and filed, when the time within which it may be filed has expired, or upon an express waiver of the right to file, the papers will be distributed to the Court by the Clerk.

.6. If the Court orders the case to be set for argument, the Clerk will notify the parties whether additional briefs are required, when they must be filed, and, if the case involves a petition for a common law writ of certiorari, that the parties shall proceed to print a joint appendix pursuant to Rule 26.

APPENDIX C

Federal Rules of Evidence

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably petinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum

or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the tertimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) **Absence of entry in records kept in accordance with the provisions of paragraph (6).** Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) **Public records and reports.** Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) **Records of vital statistics.** Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) **Absnece of public record or entry.** To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the reocrd, report, statement, or data compilation, or entry.

(11) **Records of religious organizations.** Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) **Marriage, baptismal, and similar certificates.** Statements of fact contained in a certificate that the maker

performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicabale statute authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other

published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation concerning personal or family history.** Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) **Reputation as to character.** Reputation of a person's character among associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment

in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) **Judgment as to personal, family or general history, or boundaries.** Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.